Damodar Das Vs. Muhammad Husain

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Court : Allahabad

Decided On : Dec-31-1969

Reported in : (1900)ILR22All351

Judge : Banerji and ;Aikman, JJ.

Appellant : Damodar Das

Respondent : Muhammad Husain

Judgement :

Banerji and Aikman, JJ.

1. The question which arises in this appeal is whether the defendant Muhammad Husain, who was surety for the defendant Wali Ahmad, was discharged under Section 135 of the Indian Contract Act. What happend was this. Wali Ahmad had written a letter to the plaintiff, asking for time to pay the instalments which were payable by him. In reply to that letter the plaintiff wrote to say: 'If there is no legal impediment, then I agree; if there is, then I do not agree.' It was contended in the Lower Appellate Court that this was a conditional acceptance of the proposal of the principal debtor. The learned Judge overruled this contention, and held that by reason of the creditor, plaintiff, accepting the proposal to grant time to the principal debtor the surety was discharged. It is contended before us, and in our opinion rightly, that a mere agreement between the creditor and the principal debtor does not discharge the surety unless the agreement amounts to a contract, that is,

unless the agreement is one enforceable by law at the instance of the debtor. An agreement is not enforceable by law unless there is consideration for it. In this case there was no consideration for the plaintiff's agreement to delay the realization of the instalments originally fixed. This agreement was nothing more than a mere gratuitous forbearance on the part of the creditor within the meaning of Section 137* of the Contract Act. Under Section 135 + the liability of the surety would cease if there was a contract between the creditor and the principal debtor by which the creditor promised to give time to the principal debtor. The real test for the application of that Section is whether the agreement became a contract, that is to say, whether there was consideration for the promise made in the agreement. In the absence of such consideration the agreement could not be enforced by the debtor. The cases of Philpot v. Briant (1828) Bing. 717; Tucker v. Laing (1856) 2 K. and J. 745, and Clarke v. Birley (1888) L.R. 41 Ch. D. 422, which were cited at the hearing, entirely support the contention of the learned Counsel for the appellant. It was not suggested in this case that Section 139 of the Contract Act had any application. For the above reasons we are unable to agree with the Courts below in holding that the surety was discharged by reason of the forbearance of the plaintiff to realize the instalments payable by the principal debtor. We allow this appeal and vary the decree of the Court below by setting aside that portion of the decree which dismissed the claim against Muhammad Husain with costs, and we decree the claim against the said defendant with costs here and in the Courts below, and direct the property hypothecated by the said defendant to be sold for the realization of the amount decreed, together with interest at the rate of 6 per cent, per annum up to the date of realization, unless the amount payable under the decree is paid on or before the 15tb November 1900. Our decree will be drawn up in the terms of Section 88 of the Transfer of Property Act.

*[Section 137: Mere forbearance on the part of the creditor to

Creditor's forbearance to sue the principal debtor, or to enforce any other remedy against

Surety. Him, does not, in the absence of any provision in the guarantee to the contrary, discharge the surety.]

+[Section 135: A contract between the creditor and the

Discharge of surety when principal debtor, by which the creditor makes a composi-

Creditor compounds with, tion with, or promises to give time to, or not to sue, the

gives time to, or agrees not principal debtor, discharges the surety unless the surety assents

To sue principal debtor. to such contract.]